No. 11,831

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, co-partners doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company,

Appellants,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

GEORGE H. HAUERKEN,
HAUERKEN, AMES & ST. CLAIR,
535 Russ Building, San Francisco 4, California,
Attorneys for Appellants.

Subject Index

Page

The question of the scope of Otis & Browne's authority..... 2

The question of ratification 9

Conclusion 16

Table of Authorities Cited

Pages

A. Davis & Son v. Russian Transport & Insurance Co., 169 N.Y.S. 960 .....13, 14

Arnfeld v. Guardian Assurance Company of London, 172 Pa. 605, 34 Atl. 580 .....12, 15

Ferrar v. The Western Assurance Company, 30 Cal. App. 489, 159 Pac. 609 .....11, 12, 14

Finley v. Western Empire Ins. Co., 69 Wash. 673, 125 Pac. 1012 .....12, 14, 15

Larsen v. Thuringia American Ins. Co., 208 Ill. 166, 70 N. E. 31 .....12, 15

Lauman v. Concordia Fire Insurance Company, 50 Cal. App. 609, 195 Pac. 951 .....5, 6, 7

National Fire Ins. Co. v. Oliver (Texas Civ. App.), 204 S. W. 367 .....13, 14, 15

Stevenson v. Sun Insurance Office, 17 Cal. App. 280, 119 Pac. 529 .....12, 14

Strauss v. Dubuque Fire & Marine Insurance Company, 132 Cal. App. 283, 22 P. (2d) 582 12

Walsh v. Tadlock, 104 Fed. (2d) 131 13

White v. Insurance Company of New York, 93 Fed. 161....14, 15

No. 11,831

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANTONE A. PAGLIERO, JOHN B. PAGLIERO and ARTHUR J. PAGLIERO, co-partners doing business under the fictitious firm name and style of Technical Porcelain & Chinaware Company,

Appellants,

vs.

MERCHANTS FIRE ASSURANCE CORPORATION OF NEW YORK (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

The trial Court based its decision on two or possibly three grounds: It held first that Otis & Browne were authorized to receive and act upon Merchants' request that the policy be cancelled or to otherwise agree to the cancellation of the policy; it held further that Pagliero ratified Otis & Browne's agreement that the policy be cancelled; and it finally held that there was a substitution of policies, although it is not clear whether the latter conclusion is merely a restatement

of either of the previous grounds, or whether it is a separate ground for the judgment.

Only the first two grounds are urged in the brief filed on behalf of Merchants. No reliance is apparently placed upon the so-called doctrine of substitution, except in so far as it is contended that a "substitution" resulted from acts which Otis & Browne were allegedly authorized to do or from the alleged ratification of those acts by Pagliero. With such a position we can have no quarrel. We concede that Pagliero cannot prevail in this action, if Otis & Browne were authorized to agree to a cancellation of the policy, or if Pagliero ratified that agreement. Conversely, however, it is our contention that Pagliero must prevail if Otis & Browne were not authorized to agree to a cancellation of the policy, or if Pagliero did not ratify that agreement.

THE QUESTION OF THE SCOPE OF OTIS & BROWNE'S AUTHORITY.

To support its contention that Otis & Browne were authorized to receive and act upon its request that the policy be cancelled or to otherwise agree to a cancellation, Merchants relies upon the following evidence:

(1) Upon becoming Pagliero's brokers, in the early part of 1945, Otis & Browne revised the policy which Merchants had previously issued to Pagliero and prepared several endorsements which were attached thereto. Merchants contends that the prep-

aration of those endorsements is "entirely inconsistent with the mere authority of a broker employed to obtain the issuance of a policy". (Brief for Appellee, page 7.) This is a surprising assertion to be made by an insurance company, for such a company might well be expected to know that to prepare endorsements so that a policy will fit the *particular requirements* of the assured is part of the duty of *any* broker, including a broker who does nothing but procure the policy. Accordingly, the fact that, upon becoming Pagliero's brokers, Otis & Browne procured for Pagliero what amounted to a new policy in no way tends to show that their authority extended beyond the procurement of that policy. Nor does the fact that Otis & Browne procured several other policies for Pagliero tend to show that, as to Merchants' policy or, for that matter, as to any other policy, their authority went beyond the procurement stage.

(2) Merchants further relies on the testimony of Browne to the effect that Otis & Browne handled Pagliero's "entire insurance portfolio". That testimony is found at page 68 of the printed record. On cross-examination by counsel for Merchants, Browne first confirmed the testimony that he had given on direct examination as to the circumstances under which Otis & Browne had become Pagliero's insurance brokers. He was then asked the following question, to which he gave the following answer:

> "Q. And you handled from and after that time their entire insurance portfolio, did you not?
>
> A. That is true."

Thus, the language upon which Merchants now insists so much is not the language of the witness himself, but that of counsel for Merchants. Nowhere else in the testimony of Browne or, for that matter, nowhere else in the record, is there any evidence that supports in any way the construction now sought to be given the three words thus put in Browne's mouth. It would seem that a trap was set for the witness, who of course had far less trial experience than cross-examining counsel. His answer might later turn out to be useful, if he answered the "entire portfolio" question affirmatively. If, on the other hand, he answered it negatively, no great harm would result, for it could always be shown that both his direct and his cross-examination were really directed toward other channels.

Instead of asking Browne or Pagliero specific questions as to the extent of Otis & Browne's authority, counsel chose to limit himself to the "entire portfolio" question, without even ascertaining whether these extremely equivocal words meant the same thing to the witness as they did to him. Nothing indicates that the trial judge rested his decision on Browne's answer to that question. Since there is no other evidence in the record which can be used to sustain the decision, Merchants can hardly be blamed for repeating the words "entire portfolio" at practically every other page of its brief. It is submitted, however, that, when considered in, instead of out of, their context, they cannot be used for that purpose.

To determine the significance of that testimony it is necessary to remember that the burden of proof as to the extent of Otis & Browne's authority is upon Merchants and that an insurance *broker,* as such, is not authorized to receive and act upon a notice of cancellation or to otherwise agree to the cancellation of a policy. It was accordingly sufficient for Pagliero to show that Otis & Browne were his brokers, without in any other way qualifying their authority, for the law itself provides that a broker is not authorized, unless his authority is otherwise qualified, to do more than procure a policy. The fact that, as stated by Merchants, "here we do not have any qualifications to the broker's authority" (Brief for Appellee, page 15) means either that Otis & Browne's authority was limited to the procurement of the policy or that Merchants failed to show that their authority was greater; but, since the burden of proof was upon Merchants, it does not and cannot mean that Otis & Browne were authorized to agree to the cancellation of the policy. That a broker does not as such have the authority to agree to a cancellation of the policy is of course settled. See for example the case of *Lauman v. Concordia Fire Insurance Company,* 50 Cal. App. 609, at 616, 195 Pac. 951, in which the Court said that the brokers involved in that case were "mere brokers, and being such were without authority to accept notice of cancellation".

It is in the light of those rules that the testimony of Browne must be considered. On direct examination, he testified that he was Pagliero's *broker.* Since

his cross-examination must be taken to have referred to his testimony on direct examination, his answer to the question of whether or not Otis & Browne handled Pagliero's entire portfolio can only mean that they handled it as brokers. It is, of course, conceded that Pagliero had no other insurance broker at the time. It does not follow, however, that Pagliero had given his brokers the authority to agree to a cancellation of any of his policies. Nowhere in the testimony of Browne or of anyone else is there any evidence that, as to Pagliero's entire portfolio, or as to any part thereof, Otis & Browne were authorized to agree to the cancellation of a policy or to do anything else which might be construed as implied authority to agree to such cancellation.

Merchants concedes that it did not comply with the cancellation clause in the policy and then proceeds to argue that the cases cited by Pagliero at pages 12 and 13 of his opening brief have no bearing upon this case for, according to Merchants, they deal only with the question of whether or not various cancellation clauses were complied with. It is submitted, however, that these cases are extremely significant, for they hold not only that a cancellation clause is not complied with by the giving of notice to a broker, but that the reason why it is not complied with by the giving of such notice is that the broker was not authorized to receive and act upon it. In the case of *Lauman v. Concordia Fire Insurance Company,* cited supra, for example, the insurance company dealt with the broker just as Merchants dealt with Otis &

Browne in this case, and the Court held, just as the Court should have held in this case, that the assured was not bound by those dealings, since the brokers had no authority to enter into them. The rule is, of course, the same irrespective of the type of unauthorized action taken by the broker: If he is not authorized to receive a notice of cancellation, he is obviously not authorized, after having received a request from the company that the policy be returned, to agree with the company to a cancellation of the policy.

Merchants' contention that the *Lauman* case and the other cases cited at page 13 of our opening brief are not in point is based upon its contention that Otis & Browne had greater authority than the brokers involved in those cases and accordingly can stand only if the latter contention stands. Similarly, Merchants is justified in relying upon cases in which the broker was actually authorized to agree to a cancellation, only in so far as it first establishes that in this case the brokers had such authority. There is no doubt that many of the cases cited by Merchants would support its position, if the facts in this case were the same as the facts in those cases. It is submitted, however, that extensive and repetitious quotations from such cases have little significance until and unless it is shown that Otis & Browne had the same broad authority that had been given the brokers in those cases. In and of itself the fact that the brokers in the case of *X v. Y* were authorized to agree to a cancellation has no tendency to prove that the brokers in the case of *Pagliero v. Merchants* had such authority.

In the final analysis, and leaving aside for the time being the question of ratification, the issue is whether Otis & Browne were authorized to agree to a cancellation of the policy. Merchants will prevail if, and only if, the record contains evidence of such authority. There is no substitute for such evidence, however, not even the repeated statement that Otis & Browne were general agents for Pagliero, backed up by cases in which the broker concededly was such general agent. It is our position that there is no such evidence in the record and that, in the light of the entire testimony, the answer of Browne to the question of Merchants' counsel as to whether or not he handled Pagliero's entire portfolio cannot be regarded as evidence of the fact that Otis & Browne were Pagliero's general insurance agents.

Merchants recognizes, as of course it must, that the question of whether an agent has ostensible authority to do a certain act is to be determined by the conduct or declarations of the principal and not by the conduct or declarations of the agent. Yet Merchants contends that Otis & Browne had the ostensible authority to agree to a cancellation of the policy, on the ground that Pagliero "intentionally sent them to defendant with evidence of their authority to write endorsements for plaintiffs and as to their supervision of plaintiffs' insurance". (Brief for Appellee, page 22.)

We have already shown that the authority possessed by every broker to prepare endorsements is not the authority to cancel. It can accordingly not be taken

as giving the broker ostensible authority to cancel. As to Pagliero's sending Otis & Browne to Merchants with evidence of their authority to supervise his insurance, we can only respectfully inquire: What evidence?

THE QUESTION OF RATIFICATION.

No attempt is made by Merchants to establish that Pagliero *in fact* ratified the cancellation of the policy and Merchants must accordingly be regarded as having conceded that there was no such ratification.

We established at pages 19 and 20 of our opening brief that the rule which precludes a principal from retaining the benefits of a transaction which his agent was not authorized to enter into, without at the same time shouldering the burden of that transaction, has simply no bearing upon this case, for this case involves two and not one transaction. It was, of course, necessary for Pagliero to ratify the entire transaction with the Home Fire and Marine Insurance Company in order to ratify any part of it, just as it would have been necessary for him to ratify the entire transaction with Merchants, had he wanted to ratify any part of it. The fact, however, that Otis & Browne would not have entered into one transaction, had they not entered into the other, does not compel Pagliero to ratify or reject them together. The cancellation of Merchants' policy was unconditional. Merchants accordingly cannot now contend that its policy was to be cancelled only if that of the Home Fire and Marine

Insurance Company went into effect and that, conversely, since the latter did go into effect, the former was cancelled.

Merchants contends that Pagliero cannot at the same time take advantage of the Home policy and "repudiate and deny the terms under which" that policy was obtained. (Brief for Appellee, page 21.) We have no quarrel with that contention, except that the cancellation of the Merchants' policy was not a *term* of the procurement of the Home policy.

Merchants generously suggests at page 22 of its brief that a different result might be called for, had the Home Fire and Marine Insurance Company repudiated its policy. It is submitted that the result in *this* action cannot thus be made to depend upon the position taken by the Home Fire and Marine Insurance Company as to its policy and that, by suggesting that it can, *Merchants in effect concedes the entire case.* Its contention that Pagliero "ratified" the cancellation is based upon his taking the position that the Home policy was valid. The fact that, after such a "ratification", the Home Fire and Marine Insurance Company might have denied liability on its policy could certainly not result in revoking Pagliero's "ratification". Yet such seems to be Merchants' contention and, better perhaps than anything else, it discloses the fallacy of Merchants' position.

There remains to be discussed the cases which Merchants cites in support of its contention that Pagliero ratified the cancellation of the policy. Since it is not

contended that there was ratification *in fact,* Merchants' position must be taken to be either that the unauthorized procurement of the new policy by Otis & Browne automatically terminated Merchants' liability on its policy, or that Pagliero was called upon to elect between the two policies and, as a matter of law, could not at the same time ratify the unauthorized procurement of the new policy and decline to ratify the unauthorized cancellation of the old policy.

In the case of *Ferrar v. The Western Assurance Company,* 30 Cal. App. 489, 159 Pac. 609, the action was brought against the second company (the Home Fire and Marine Insurance Company in our case) and not, as in our case, against the first company (Merchants). No question of "substitution" was presented, the only issue being as to the extent of the authority of the broker to whom the first company had given notice of cancellation and who subsequently procured the policy sued upon. The Court found the broker to be "her (the insured's) general agent to keep her insured". He was accordingly authorized to accept and act upon a notice of cancellation. In our case, however, *Otis & Browne were not authorized to keep Pagliero insured.* They were accordingly not authorized to accept and act upon a notice of cancellation. As an alternative ground of decision the Court held that the plaintiff ratified the procurement of the new policy. In denying a petition for a hearing, however, the Supreme Court of California stated that it meant to express no view on the question of ratification discussed by the District Court of Appeal, as

a decision on that question was not essential to a determination of the case. The case is accordingly authority only as to the first ground of decision. In so far as the case has any bearing upon our problem, it may be said to support Pagliero's position rather than that of Merchants, since the Court held that the fact that the assured had previously collected from the first company had no bearing upon the determination of the action brought against the second company. That is exactly our contention in this case.

It may be mentioned that Merchants cites the *Ferrar* case for the proposition that California allows ratification after a loss, without indicating, however, that the Supreme Court expressly withheld approval of that part of the decision of the District Court of Appeal.

We already fully discussed in our opening brief the following cases relied upon by Merchants: *Stevenson v. Sun Insurance Office,* 17 Cal. App. 280, 119 Pac. 529; *Finley v. New Brunswick Fire Ins. Co.,* 193 Fed. 195; *Arnfeld v. Guardian Assurance Company of London,* 172 Pa. 605, 34 Atl. 580; *Finley v. Western Empire Ins. Co.,* 69 Wash. 673, 125 Pac. 1012; *Larsen v. Thuringia American Ins. Co.,* 208 Ill. 166, 70 N. E. 31. Nothing said by Merchants as to any of those cases requires further discussion, particularly since we are convinced that this Honorable Court will want to read each of them to determine which of their interpretations is correct.

Nothing need be added either to our analysis of *Strauss v. Dubuque Fire & Marine Insurance Com-*

pany, 132 Cal. App. 283, 22 P. (2d) 582, except to point out that Merchants concedes that the facts which it alleges to have been the facts of that case are not set forth in the opinion. Under such circumstances, the case is obviously not authority for the propositions for which it is cited by Merchants.

No question of whether or not a policy was cancelled is presented in the case of *Walsh v. Tadlock,* 104 Fed. (2d) 131. The case, however, is a rather good example of the application of a principle for which *Pagliero* contends, namely that a party cannot take advantage of part of a transaction entered into by his agent, without being bound by the whole. As distinguished from the situation presented in this case, there was only one transaction and one policy involved in the *Walsh* case.

In the case of *National Fire Insurance Co. v. Oliver* (Texas Civ. App.), 204 S.W. 367, the broker was the agent of both insurance companies and was authorized by the assured to keep him insured up to a certain amount. He was accordingly authorized to accept notice of cancellation. The Court pointed out that the new policy was to become effective only when the effectiveness of the old one ceased, a condition which the broker was of course bound to impose, since he was the agent of both companies, but a condition which was not imposed in this case.

In the case of *A. Davis & Son v. Russian Transport & Insurance Co.,* 169 N.Y.S. 960, the broker was similarly authorized to keep the plaintiff insured up to a

certain amount and was accordingly authorized to accept notice of cancellation in his behalf. Moreover, the part of the opinion quoted at page 44 of the brief for Merchants is pure dictum since the case was decided both in the trial Court and on appeal on the ground that the assured had not submitted proofs of loss within the required 60 days' period.

Thus, our review, both in this and in our opening brief, of the cases relied upon by Merchants discloses that, in addition to other distinguishing features found in some of them, each of them contains one or more of the following features, of which none is found in the present case:

(a) Actual authority of the broker to cancel the policy or general authority to manage all of the assured's insurance business or to keep him insured up to a certain amount.

Finley v. New Brunswick Fire Insurance Co., 193 Fed. 195;

White v. Insurance Company of New York, 93 Fed. 161;

Ferrar v. The Western Assurance Company, 30 Cal. App. 489, 159 Pac. 609;

Stevenson v. Sun Insurance Office, 17 Cal. App. 280, 119 Pac. 529;

Finley v. Western Empire Ins. Co., 69 Wash. 673, 125 Pac. 1012;

National Fire Ins. Co. v. Oliver (Texas Civ. App.), 204 S. W. 367;

A. Davis & Son v. Russian Transport & Ins. Co., 169 N.Y.S. 960.

(b) Ratification in fact of the unauthorized cancellation as distinguished from the ratification as a matter of law which Merchants seeks to impose upon Pagliero as a consequence of his having ratified an entirely separate transaction.

White v. Insurance Company of New York, 93 Fed. 161;

Arnfeld v. Guardian Assurance Company of London, 172 Pa. 605, 34 Atl. 580;

Larsen v. Thuringia American Ins. Co., 208 Ill. 166, 70 N. E. 31.

(c) The broker being the agent for either or both of the insurance companies, with the result that the first company was in effect protected by a condition in the second contract which made the validity of that contract depend upon the termination of the first one.

Finley v. New Brunswick Fire Insurance Co., 193 Fed. 195;

Arnfeld v. Guardian Assurance Company of London, 172 Pa. 605, 34 Atl. 580;

Finley v. Western Empire Ins. Co., 69 Wash. 673, 125 Pac. 1012;

National Fire Ins. Co. v. Oliver (Texas Civ. App.), 204 S. W. 367.

It appears, therefore, that none of the cases cited by Merchants support its position and that a naked and pure doctrine of substitution, under which the procurement of one policy automatically terminates another, simply does not exist. The word is nothing but a convenient catch-all. Before Merchants can be

allowed to use it, however, it must do more than just say "substitution"; it must establish that this case is of a type in which the Courts have allowed the word to be used.

CONCLUSION.

The Home Fire and Marine Insurance Company seems to have a different conception of its duties to its policy holders. Although it might have contended that its own policy was not in effect, since that of Merchants had not been validly cancelled, it chose instead to honor its contract. Pagliero is far from conceding that he would not have been entitled to recover under the Home Fire and Marine Insurance policy, had his rights under that policy been challenged. The liability of *Merchants* remains the same, however, even if it be assumed that the Home Fire and Marine Insurance Company, for reasons of business policy, paid a loss which it did not have to pay.

One word may be added about the contention made at page 21 of the brief for Merchants that to allow Pagliero to recover in this case would in effect allow a "double recovery": Pagliero was damaged in the sum of almost $465,000 and, to cover that loss, he had policies which, including that of Merchants and that of the Home Fire and Marine Insurance Company, amounted to a total face value of $315,000.

In the final analysis, this case is one of first impression. None of the cases relied upon by Merchants support its position and it must be conceded that the

cases relied upon by Pagliero can be distinguished to some extent, although several of them stand squarely for the proposition that recovery from one company does not preclude recovery from the other. It is further conceded that the *language* in some cases, as distinguished from the *holding* of those cases, may be unfavorable to Pagliero's position. We need not emphasize, however, that, although it is entitled to respect, the language of a United States District Court or of the Appellate Division of the New York Supreme Court is not binding upon this Honorable Court.

If there is no separate doctrine of substitution, and we submit that there is none, this case turns on the question of prior authority or ratification. Since the cancellation clause was not complied with and Pagliero neither agreed to a cancellation nor authorized Otis & Browne to agree thereto, nor ratified any agreement cancelling the policy, the judgment should be reversed.

Dated, San Francisco, California,
May 10, 1948.

Respectfully submitted,
GEORGE H. HAUERKEN,
HAUERKEN, AMES & ST. CLAIR,
Attorneys for Appellants.